

LIBRARY
SEARCHED OCT 16 1957
Office - Supreme Court, U.S.
FILED
OCT 16 1957
JOHN T. FEY, Clerk

No. 6

In The
Supreme Court of the United States

October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Appellants,

v.

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, Appellees**

**On Appeal from the United States District Court
for the District of Columbia**

REPLY BRIEF

PETER T. BEARDSLEY

FRITZ R. KAHN

1424 16th Street, N. W.
Washington, D. C.

*Attorneys for American Trucking
Associations, Inc.*

ROLAND RICE

ALBERT B. ROSENBAUM

1111 E Street, N. W.
Washington, D. C.

*Attorneys for Regular Common
Carrier Conference of A.T.A.*

EUGENE L. COHN

1 No. LaSalle Street
Chicago, Illinois

JOSEPH E. LUDDEN

2130 South Avenue
La Crosse, Wisconsin

STEPHEN ROBINSON

1020 Savings & Loan Bldg.
Des Moines, Iowa

HOMER E. BRADSHAW

REX H. FOWLER

510 Central National Bldg.
Des Moines, Iowa
Attorneys for Appellant Motor Carriers

INDEX

PAGE

Preliminary	2
The Commission's Present Interpretation of the Legislative History of the Motor Carrier Act is the Exact Opposite of its Earlier Construction.....	2
The Commission's Brief Misstates Appellants' Position Respecting the Specific Restrictions Which Should be Imposed	4
In Its Present Administration of the Law, The Commission Largely Ignores the Statutory Prohibition Against Unrestricted Motor-Vehicle Operations	6
Rock Island Motor Transit's Brief Fails to Accurately Analyze the Testimony of Many Witnesses.....	11
Certificate of Service	22

TABLE OF CASES

<i>Burlington Truck Lines—Purchase—Arrow Freight Lines</i> , Docket No. MC-F-6345.....	8
<i>Burlington Truck Lines, Inc.—Purchase—Love Transfer</i> , Docket No. MC-F-6528.....	10
<i>Howard Terminal—Control—El Dorado Motor Transportation Co.</i> , Docket No. MC-F-6415.....	9
<i>Hudson Transit Lines v. United States</i> , 82 F. Supp. 153	18
<i>Interstate Commerce Commission v. Parker</i> , 326 U. S. 60	10
<i>Pacific Motor Trucking Co. Ext.—Automobiles—California Assembly Plants to 7 Western States</i> , Docket No. MC-78787 (Sub-No. 37).....	10
<i>Pacific Motor Trucking Co. Ext.—Oregon</i> , Docket No. MC-78787 (Sub. No. 34).....	9
<i>Pennsylvania Truck Lines, Inc.—Control—Barker</i> , 1 M.C.C. 101.....	6

INDEX (Continued)

	PAGE
<i>United States v. Rock Island Motor Transit Co.</i> 340 U.S. 419.....	4
<i>United States v. Texas & Pacific Motor Transport Co.</i> , 340 U.S. 450.....	4

No. 6

IN THE

Supreme Court of the United States

October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellees*

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF

Appellants, American Trucking Associations, Inc., its Regular Common Carrier Conference, Iowa-Nebraska Transportation Company, Des Moines Transportation Company, Inc., Bruce Motor Freight, Inc., Western Transportation Company, McCoy Truck Lines, Inc., Brady Transfer and Storage Company, Motor Cargo, Inc., Gateway Transportation Company, and Bos Truck Lines, Inc., for their reply to briefs filed herein by the Interstate Commerce Commission, appellee, and Rock Island Motor Transit Company, intervening appellee, say to this Honorable Court:

PRELIMINARY

This reply brief is filed for four reasons: First, the Commission's brief herein affords a striking contrast to its earlier interpretation of the legislative history of the Motor Carrier Act of 1935, as set forth in its brief to this Court in the *Texas & Pacific* case; second, the Commission's brief misstates our position respecting the nature of "auxiliary and supplemental" restrictions which the proviso of § 5(2)(b) requires in cases of this kind; third, the Commission's brief is misleading, however unintentionally, regarding its *present* attitude toward the Congressional policy involved; fourth, the brief of The Rock Island Motor Transit Company, one of the intervening appellees, in referring to the testimony which it relies upon to support the Commission's order, fails, in several instances, to accurately analyze such testimony, with the result that incorrect conclusions are drawn therefrom.

The Commission's Present Interpretation of the Legislative History of the Motor Carrier Act is the Exact Opposite of its Earlier Construction.

Commencing at page 26 of its brief, the Commission, in an apparent attempt to buttress its claim of unlimited discretion to determine the limits of railroad operation of motor vehicles (or indeed, whether there should be any limits at all), sets forth its *current* interpretation of the legislative history of the Motor Carrier Act of 1935. In so doing, it contends (page 26) that the legislative history shows "that no one concerned had any precise idea as to the extent to which railroads should be allowed to engage in motor transportation"; that Commissioner Eastman, in his testimony respecting the

¹ The United States has not filed a brief in this proceeding and, presumably, does not support the Commission's order before the Court.

proposed legislation "was urging further experimentation in railroad use of motor vehicles" (page 28); that "the extent to which a railroad could render motor carrier service to points which it already served by rail was nowhere defined or discussed." (pp. 30-31). The Commission then concludes (page 31) that "In any event, *the legislative history contains no suggestion that the proviso in Section 213(a)(1) was to be read into section 207 as a rigid limitation on the Commission's power to issue certificates of public convenience and necessity for new motor service.*" (emphasis theirs)

The above-cited statements and conclusion are in striking contrast to the Commission's previous interpretation of the legislative history of the Motor Carrier Act of 1935. In its brief in No. 38, *U. S. v. Texas and Pacific Motor Transport Company*, October Term, 1950, which involved, as does this case, a § 207 application filed by a railroad subsidiary, the Commission had this to say (pages 32-33) :

It is apparent that, as in *Coordination of Motor Transportation, supra*, the use which Commissioner Eastman considered that the railroads could, with advantage to themselves and the public, make of motor trucks and vehicles was the auxiliary or supplemental use thereof in their own operations. He was not recommending that the railroads be allowed to go into the general motor carrier business in competition with their own operations and those of independent motor carriers. And that such was not the intent of the bill as enacted into law is shown by statements on the floor of Congress by those in charge of the legislation.^{1a}

The Commission's present interpretation of the legislative history of the Motor Carrier Act of 1935 is completely the opposite of its earlier one. Since the provi-

^{1a} The Commission then went on to cite the statements of Congressman Sadowski and Senator Wheeler referred to at pages 17-18 of our brief herein.

sions of the law remain the same, both of the Commission's interpretations cannot be correct. We respectfully submit that it was right the first time and that this Court's decision in the *Rock Island* and *Texas & Pacific* cases have affirmed its earlier construction.

The Commission's Brief Misstates Appellants' Position Respecting the Specific Restrictions Which Should be Imposed.

At various points throughout its brief, the Commission refers to what is said to be our position respecting the requirement of the proviso of § 5(2)(b) relative to so-called "auxiliary and supplemental" restrictions which must be imposed in cases of this kind. For example, at page 26 of its brief, the Commission refers to our "specific contentions" that the proviso requires the Commission to restrict railroad motor-carrier operations "to largely less-than-truckload movements to smaller points and on railroad bills of lading and at rail rates . . ." Again, at page 31, the Commission similarly characterizes our position. And at page 68 of its brief, our position is said to be one which "would preclude Motor Transit from performing motor transportation between any two points each of which has a population in excess of 6,000."

These statements completely misstate our position. What we have said, and all that we have said, is that the language of the proviso of § 5(2)(b), to use the Commission's phrase, means what it says. This being so, we contend that the Commission, in a § 5 proceeding or a § 207 case such as this, must so restrict the motor operations of the railroad or its affiliate as to enable it to find that the service by motor vehicle will be used in "its [the railroad's] operations." Once this has been done, the railroad or its affiliate is, of course, free, within the limits specified, to transport freight, in small or large volume, between the points, whatever their population, within the territory involved, and these appellants have

never contended otherwise. Thus, under the certificate issued September 11, 1951, intended to restrict the rail subsidiary to auxiliary and supplemental operations, and set forth in the map preceding page 1 of our brief, Motor Transit could have performed service between Chicago and Iowa City or between Chicago and Cedar Rapids. Since the Commission itself shows the population of Iowa City to be 27,212 and Cedar Rapids to be 72,296 (see map appended to its brief), it is idle for it to argue, as it does, that our position would preclude "Motor Transit from performing motor transportation between any two points each of which has a population in excess of 6,000." We hasten to add that under a prior or subsequent rail-haul restriction, which we urge that the Commission be required to impose, the railroad's motor subsidiary would be able to transport traffic in unlimited volume, between any points in its territory, provided only that the traffic had previously moved in rail service or was destined to so move after completion of the motor portion of the through journey.

In addition, the Commission itself, not these appellants, is responsible for the historical development of conditions which "restrict" railroad motor operations to traffic which moves on rail billing at rail rates. To describe these conditions as "restrictions" is in reality a misnomer. We say this because, where there is any difference in the rate levels of less-than-truckload as against less-than-carload shipments, the rail rate is invariably lower. Thus, railroad motor affiliates often have a rate advantage over independent motor carriers by virtue of the so-called restriction which ties them to rail rates.

In addition to what we have said regarding the Commission's misstatements relative to our position in respect to the imposition of auxiliary and supplemental restrictions, one other facet of the Commission's brief on this phase of the case deserves mention. It will be

noted that the Commission lays great stress upon the fact that its order herein allows the rail subsidiary to perform unrestricted motor carrier service "only to points on or near the rail line." See, e.g., pages 19 and 25 of the Commission's brief. Thus the Commission, for all intents and purposes, argues that a condition which merely limits otherwise unrestricted motor service performed by a railroad or its affiliate to points "on or near the rail line," will conform to the Congressional policy evidenced by the proviso of § 5(2)(b). This, in turn, brings the attitude of the Commission into clear focus. It is no longer concerned that proposed railroad motor carrier operations will, in the language of the *Barker* case, 5 M.C.C. 9, 11, "compete with an established motor carrier." It continues to be much concerned, however, with limiting the railroad motor operations authorized herein to points on or near the rail line. Why? Because, we submit, as stated in *Barker*, *supra*, should such motor operations not be so limited, they would "invade to a substantial degree a territory already adequately served by another rail carrier." Thus the Commission abandons its obligation to prevent undue encroachment by railroads upon the independent motor carrier field, while at the same time continuing its efforts to prevent rail invasion of another railroad's operating territory through the use of motor vehicles.

In Its Present Administration of the Law, The Commission Largely Ignores the Statutory Prohibition Against Unrestricted Motor-Vehicle Operations.

The Commission's brief goes to great lengths to stress that only the existence of what are said to be exceptional circumstances² led it to authorize Motor Transit to perform all-out truck service completely divorced from

² Characterized, at page 11 of its brief, as "an unusual or special need" for the performance of unrestricted truck service by the rail subsidiary.

its rail parent's train operations. In so doing, it emphasizes the fact that its order herein "is based upon Section 207(a) which . . . does not contain the limitations upon motor carrier operations by railroads which the proviso of Section 5(2)(b) imposes where a railroad or its affiliate requires [sic] an existing motor carrier operation." Although the corollary of this argument would seem to be that the Commission is bound, in Section 5 cases, to limit rail operation of trucks to coordinated rather than unrestricted service, nevertheless the Commission insists that even there it has discretion to ignore the positive mandate of the statute in "unusual or special cases." Parenthetically, if, as the Commission insists at page 20 of its brief, statutes "mean what they say" we are at a loss to understand how it can, at one and the same time, find so much room for discretion in language which states that it "shall not" issue an order approving rail operation of motor vehicles unless certain conditions,³ not satisfied by its order herein, are met.

In any event, the rationale of the Commission's argument respecting this phase of the case is that the Commission has taken great care, in both Section 5 and 207 cases, to assure that the unrestricted service authorized to be performed by railroads or their affiliates has, in every instance, been allowed only "to meet an unusual or special public need for service which other motor carriers were not providing." Commission brief, page 12. Whether or not that allegation correctly sums up the infrequent past departures from the Congressional policy cited, we respectfully submit that it is simply not the fact with respect to the Commission's present administration of the law.

The, to us, appalling fact is that in its *current* administration of the law the Commission, by and large, treats

³ i.e., that the motor operations will be used "to public advantage in its [the parent railroad's] operations."

the mandate of Section 5(2)(b) in a most cavalier manner, whether the request of the railroad to perform unrestricted truck service is filed pursuant to Section 5 or 207. It has recently, in both types of cases, ignored the language of the proviso without even an intimation in the record that there is "an unusual or special public need for service which other motor carriers were not providing." In *Burlington Truck Lines—Purchase—Arrow Freight Lines*, a Section 5 case, the Commission's Examiner, in recommending that the application be denied, stated:

There are no special, or unusual, circumstances shown to be present in this proceeding which would warrant a departure from the policy stated in *Rock Island Motor Transit Co.—Purchase—White Line*, 40 M.C.C. 457, and 55 M.C.C. 567, requiring that every grant of authority to a railroad, or a railroad affiliate, of rights to operate as a motor carrier of property, or to acquire such rights by purchase, or otherwise, should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, rail service. Such a limitation does not permit all motor carrier service or the interchange of freight with other motor carriers under joint rates. See also *Rock Island Motor Transit Co.—Purchase—Riley*, 45 M.C.C. 544. Under the circumstances, the transaction may not properly be approved on the basis of the evidence submitted on the present record.

Despite the absence noted by the Examiner of any record evidence indicating any "unusual" circumstances which would justify a departure from the policy which the Commission's brief so stoutly maintains it strives to uphold, the Commission's division 4 abruptly reversed the Examiner's recommended order and authorized the purchase without restrictions.⁴ To be sure, the Division

⁴ Docket No. MC-F-6345, *Burlington Truck Lines—Purchase—Arrow Freight Lines*, decided June 21, 1957. Pending before the entire Commission on reconsideration.

paid lip service to the Congressional policy by stating that "considering all the evidence, we are of the opinion that an exception to the principles discussed in the *Rock Island* case is warranted." However, the report nowhere indicates that the independent motor carriers in the area have in any way failed to render an adequate service. Other recent examples of Commission decisions which demonstrate that its current administration of the law falls far short of the claimed consistent adherence to the Congressional policy, are:

Docket No. MC-78787 (Sub-No. 34)—*Pacific Motor Trucking Co. Ext.—Oregon*: In this proceeding, a § 207 case, the entire Commission, by report and order dated May 8, 1957, authorized the wholly-owned subsidiary of the Southern Pacific Railroad to perform unrestricted motor *contract* carrier service from General Motors Chevrolet plants in Oakland, California, to all points in Oregon which are stations on the line of its parent railroad. By order of August 16, 1957, reconsideration was granted, and the matter is now pending.

Docket No. MC-F-6415—*Howard Terminal—Control—El Dorado Motor Transportation Co.* By report and order dated May 23, 1957, the Commission, Division 4, approved the purchase by Howard Terminal, which controls the Howard Terminal Company, a railroad, of control of El Dorado, a motor carrier, and, through the acquisition, the performance of unrestricted truck operations in the Sacramento area.

In none of the cases just cited are the Commission's or its Examiners' reports supported by record evidence that the authority granted or recommended is required by "an unusual or special public need for service which other motor carriers were not providing," and the reports themselves contain no such finding. This is likewise true of the Examiners' decisions referred to immediately below.

The Commission's examiners have been quick to appreciate its changed attitude respecting adherence to the Congressional policy embodied in § 5(2)(b), and have reacted accordingly. For example, in Docket No. MC-78787 (Sub-No. 37)—*Pacific Motor Trucking Co. Ext.—Automobiles—California Assembly Plants to 7 Western States*, the examiner, by report served June 20, 1957, has recommended that the Southern Pacific Railroad's wholly-owned subsidiary be granted unrestricted motor contract carrier authority to transport new automobiles, trucks and buses, from General Motors plants at Los Angeles and Oakland, California, to all points on the rail parent's lines in the States of Arizona, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Washington. And in Docket No. MC-F-6528—*Burlington Truck Lines, Inc.—Purchase—Love Transfer*, the examiner, by report served August 16, 1957, has recommended that the subsidiary of the Burlington Railroad be authorized to purchase, without restriction, the operating rights of Love, an independent motor carrier.

Some of the cited cases involved little or no protest to the application by independent motor carriers but that does not excuse the Commission's failure to adhere to the Congressional policy, for it is the Commission, and no one else, which is required "to guard against the danger of the development of a transportation monopoly." *I.C.C. v. Parker*, 326 U.S. 60, 73.

Regardless of the justification, or lack thereof, for the Commission's occasional past failure to adhere to Congressional policy, its present day-to-day unwillingness, generally speaking, to conform to the mandate of § 5(2) (b), emphasizes the need, adverted to at pages 71-76 of our original brief herein, for reexamination of the *Parker* case and the corrective action by this Court requested therein.

Rock Island Motor Transit's Brief Fails to Accurately Analyze the Testimony of Many Witnesses.

Intervenor-Appellee, The Rock Island Motor Transit Company, commencing at page 23 of its brief, seeks to refute the appellants' contention "that the District Court erred in failing to set aside the Commission's order for lack of evidentiary support as to the 'major points.'" It attempts to do this by summarizing the testimony of 40 shipper or chamber of commerce witnesses from such "major points" as Chicago, the Quad-City area (Davenport and Bettendorf, Iowa, and Rock Island, Moline and East Moline, Illinois), Iowa City, Cedar Rapids, Des Moines, Omaha and Council Bluffs. What is not clear from a reading of these summaries is that the testimony related almost completely to the need for service to or from the smaller points lying intermediate to the "major" points. Insofar as their testimony touched on the present availability of service being rendered by independent motor carriers between the larger distribution centers, it would more accurately be summarized as follows:

Mr. D. R. MacDonald of Chicago testified that some motor carriers were rendering excellent service from Chicago to Iowa destinations on U.S. Highway 6. (R. 269-270). The brief of The Rock Island Motor Transit Co., at page 24, summarizes the witness' testimony to convey the contrary impression, stating in part, "Other carriers had failed to respond to calls for pick-up service for out-bound shipments, while Rock Island Motor Transit had responded to all calls promptly in a three months' period." In fact, the witness testified that, in addition to Rock Island Motor Transit Company, Iowa-Nebraska Transportation Company and Des Moines Transportation Company responded on the same day to telephoned requests for pickups; other motor carriers, such as Bos Truck Lines, Inc., Brady Motorfrate, Inc., McCoy Truck Lines, Inc., and Watson Brothers Transportation Com-

pany, responded the same day or the day following in most cases. (R. 270-271).

Mr. B. J. Lussa of Chicago testified that he was satisfied with the service he has received from the Rock Island Motor Transit Company from Chicago to Iowa destinations (R. 278) and as a matter of fact has not used any other carrier to these particular points. (R. 280).

Mr. R. Ozinga of Chicago testified that, while Rock Island Motor Transit Company was the most reliable carrier to "the so-called smaller towns or non-key-point towns" (R. 282-283), he uses Takin Brothers Freight Line, Inc., to Cedar Rapids and Iowa City, Rock Island Transfer and Storage Company to the Tri-City area (Davenport, Rock Island and Moline), Prucka Transportation, Inc., to Council Bluffs and Des Moines Transportation Company to Des Moines. (R. 285).

Mr. D. R. Hoppe of Chicago testified that he was satisfied with the service he has received from the Rock Island Motor Transit Company from Chicago to Iowa destinations and has had no occasion to use any other common carrier by motor vehicle. (R. 289).

Mr. A. J. Maurer of Chicago testified that there is adequate truck service from Chicago to the larger points. (R. 247). Twenty-two motor carriers operate between Chicago and Davenport; ten serve Iowa City; at least four serve Grinnell; at least nine serve Newton; and at least six serve Atlantic. (R. 251-256). He thought there probably was no demand for any additional motor carrier service between Chicago and Omaha. (R. 253).

Mr. H. H. Stevens of Moline testified that he has "a lot of lines" and "can get service" to such points as Des Moines and Omaha. (R. 468-469).

Mr. P. E. Gans of Moline qualified his statement that he knew of no motor carrier—other than Rock Island

Motor Transit Company—rendering service from the Tri-City area (Davenport, Rock Island and Moline) to a number of Iowa destination points by limiting his observations to carriers "with complete terminal facilities in the Tri-Cities." He further qualified his statement by acknowledging that he shipped assembled farm implements by motor common carriers other than Rock Island Motor Transit Company. (R. 263-264).

Mr. F. J. Schunter of Moline testified that he was satisfied with the service of the Rock Island Motor Transit Company and has had no occasion to make inquiry whether or not there might be other service available. (R. 327).

Mr. C. H. Pahl of Rock Island testified that he was unable to recall the name of any motor carrier which refused to accept shipments from Rock Island to any Iowa destination point. (R. 884-885).

Mr. H. C. Woodard of the Tri-City area testified that he was not familiar with the operations of motor truck operators operating between the Tri-City area, Des Moines and Omaha; he knew neither their identity nor their general operations. (R. 394-395).

Mr. G. M. Cummins of Davenport testified that there are 27 carriers rendering daily service between Chicago and the Tri-City area (Davenport, Rock Island and Moline). From Davenport to such points as Grinnell, Newton, Council Bluffs and Des Moines interstate motor carrier service other than that of the Rock Island Motor Transit Company was available. (R. 234).

Mr. J. A. Gould of Muscatine testified that he has used the services of Poole Transfer, Inc., as well as those of the Rock Island Motor Transit Company. (R. 1265).

Mr. R. L. Swcany of Muscatine testified that the major motor carrier in Muscatine is Poole Transfer, Inc., serv-

ing Minneapolis and Chicago daily. In addition to the Rock Island Motor Transit Company, the Burlington Transportation Company (R. 1254), Green Transportation Lines, Inc., Hedrick Motor Freight Line, and Western Transportation Company serve Muscatine. (R. 1259-1260).

Mr. H. P. Jacobs of Iowa City testified that truck lines other than Rock Island Motor Transit Company operate between Chicago and Iowa City. (R. 487). Watson Brothers Transportation Company as a matter of fact maintains an office at Iowa City. (R. 490).

Mr. J. H. Nesmith of Iowa City testified that he generally uses only the Rock Island Motor Transit Company on out-of-state shipments. (R. 492).

Mr. C. H. Swanholm of Iowa City testified that, in addition to the Rock Island Motor Transit Company, he has used Poole Transfer, Inc., Merchants Transfer and Storage Company, Watson Brothers Transportation Company and other carriers for interstate shipments. (R. 495).

Mr. T. Slager of Iowa City testified that there are a number of trucking companies serving Iowa City. (R. 1144). In addition to the Rock Island Motor Transit Company, he has used Western Transportation Company and Watson Brothers Transportation Company. (R. 1144-1146).

Mr. J. P. Wegmuller of Iowa City testified that he has used the services of motor carriers other than the Rock Island Motor Transit Company. (R. 1139).

Mr. R. L. Gage of Iowa City testified that its trucking facilities is one of the outstanding attractions of Iowa City. (R. 485).

Mr. Harold F. Ewoldt of Cedar Rapids testified that there is a substantial number of motor carriers operat-

ing between Cedar Rapids and such points as Chicago, the Tri-City area and Omaha. (R. 1121). Fifteen carriers operate between Chicago and Cedar Rapids alone. (R. 1124).

Mr. L. L. Johnson of Cedar Rapids testified that he could not name any town where he had an account that could not be servired out of Chicago with truckload lots. (R. 1114). He has had no occasion to make any investigation as to whether any transportation, other than The Rock Island Motor Transit Company, is available from Chicago to certain Iowa destination points. (R. 1115).

Mr. M. F. Zimmerman of Grinnell testified that he had used the services of the Rock Island Motor Transit Company almost exclusively for the preceding five years. (R. 714).

Mr. E. Mathews of Grinnell testified that he has received shipments from Iowa-Nebraska Transportation Company as well as the Rock Island Motor Transit Company. (R. 717).

Mr. B. Ritter of Grinnell testified that he has received shipments from the Watson Brothers Transportation Company, Nebraska Motor Transport, Inc., and McCoy Truck Lines, Inc., as well as the Rock Island Motor Transit Company. (R. 734).

Mr. D. H. McKean of Grinnell testified that Western Transportation Company maintains a full-time terminal agent at Grinnell. (R. 749). The Iowa-Nebraska Transportation Company and the Des Moines Transportation Company as well as Western and Rock Island Motor Transit Company, have delivered freight to him. (R. 750):

Mr. P. Brink of Grinnell testified that the Iowa-Nebraska Transportation Company, the Western Transportation Company and the Des Moines Transportation Company, in addition to the Rock Island Motor Transit Com-

pany, serve Grinnell (R. 755), and he has received shipments from these carriers. (R. 758).

Mr. L. V. Phelps of Grinnell testified that he has received truckload shipments from Chicago via American Transit Line. (R. 726-727). He has received less-than-truckload shipments from Iowa-Nebraska Transportation Company and he has received shipments from Pasch Cartage Company which does local cartage work for Kee-shin Motor Express Company and Des Moines Transportation Company (R. 728).

Mr. F. Triggs of Des Moines testified that a number of motor carriers, including Des Moines Transportation Company, Watson Brothers Transportation Company and Western Transportation Company, are available for transporting shipments between Chicago and Des Moines. (R. 1295).

Mr. L. Lomberto of Des Moines testified that he has used the Des Moines Transportation Company, Western Transportation Company and quite a few other carriers on inbound shipments from the East. (R. 1304).

Mr. L. Brody of Des Moines testified that, in addition to the Rock Island Motor Transit Company, Watson Brothers Transportation Company has transported shipments for his concern. (R. 1312).

Mr. R. M. Griffith of Des Moines testified that he had no difficulty finding carriers to handle shipments in excess of 5,000 pounds after that weight limitation was imposed upon the Rock Island Motor Transit Company. (R. 1314).

Mr. C. A. Hausen of Des Moines testified primarily as to the smaller intermediate points. (R. 1318).

Mr. B. Robinson of Atlantic testified that he has received inbound shipments from the Iowa-Nebraska Transportation Company, as well as the Rock Island Motor Transit Company. (R. 542).

Mr. M. Turner of Atlantic testified that Watson Brothers Transportation Company served Atlantic daily and that in addition Iowa-Nebraska Transportation, as well as the Rock Island Motor Transit Company, serves the area. (R. 935).

Mr. O. A. Meredith of Atlantic testified that, while his firm specifies the Rock Island Motor Transit Company on all shipments, it has had service from Watson Brothers Transportation Company, Iowa-Nebraska Transportation Company, Bos Truck Lines, Inc., and possibly others. (R. 533).

Mr. D. C. Mitchell of Atlantic testified that he was able to find other carriers to handle shipments in excess of 5,000 pounds after that weight limitation was imposed upon the Rock Island Motor Transit Company. (R. 549, 551).

Mr. G. Ball of Council Bluffs testified that he has received satisfactory service on shipments from Chicago to Council Bluffs from Prutka Transportation, Inc. and On-Time Truck Line. He has used Watson Brothers Transportation Company, Darling Transfer and Transamerican Freight Lines, Inc., as well as the Rock Island Motor Transit Company, on outbound shipments from Council Bluffs. (R. 1008).

Mr. P. E. Seastedt of Omaha testified that on outbound service from Omaha, the service in which he was most interested, he had the services of two or more carriers available to some points in Iowa on U.S. Highway 6; to other points only Rock Island Motor Transit Company renders a service. He hasn't had "too great a complaint" about the service rendered by the other motor carriers. (R. 1011-1012). Since the 5,000-pound weight limitation was imposed on the Rock Island Motor Transit Company, he has used other carriers for volume shipments. (R. 1013).

Mr. J. J. Hartnett of Omaha testified that on shipments from Omaha to cities such as the Tri-Cities, Ottumwa, Cedar Rapids, Minneapolis and Des Moines he has the services of a number of motor carriers available to him and that he has used most of them, as well as the Rock Island Motor Transit Company, to those points. (R. 1005).

The testimony of these forty witnesses, as well as the testimony of the independent motor carriers themselves (as summarized at pages 88-95 of the appellants' brief), is conclusive on the point that the record lends no support to a finding that the public convenience and necessity require the service of the Rock Island Motor Transit Company between the major points referred to. At best the testimony reveals a shipper preference for the service of the Rock Island Motor Transit Company, in several instances coupled with lack of knowledge of, rather than dissatisfaction with, the services of independent motor carriers. But the Commission itself has recognized that a mere preference for the services of an applicant does not satisfy the applicant's burden of proving his services are *required* by the public convenience and necessity. As was pointed out at page 53 of the appellants' brief, "there must be an affirmative showing not only that a common carrier service is required in the convenience of the public but also that it is a necessity, and . . . the latter element includes a showing that present facilities are inadequate." *Hudson Transit Lines v. United States*, 82 F. Supp. 153, 157, affirmed *per curiam*, 338 U. S. 802, 70 S. Ct. 59. Here no showing of inadequate service between such points as Chicago, Cedar Rapids, Council Bluffs, Des Moines, Iowa City, the Quad-City area, and Omaha can be made; the independent motor carriers are ready, willing and able to transport—and, in fact, are presently transporting—all freight tendered them between these points.

One other erroneous impression conveyed by the brief of the Rock Island Motor Transit Company is of sufficient importance to call for clarification. At page 45 of its brief, the intervenor-appellee states:

It is charged that at many points where no Motor Transit representative is stationed, railroad agents act for it. This is contrary to the record and is supported only by an inadvertent statement by one witness at Ladora, Iowa, (R. 455-456) who apparently was referring to rail-billed traffic. The Commission made no finding that the rail depot agent assumes to act for Motor Transit with respect to shipments moving on motor carrier billing. The record is just the reverse.

Lest there be any doubt what the record contains with respect to our allegation that at many points where no Motor Transit representative is stationed the railroad depot agent assumes his functions, we shall quote verbatim from a few pertinent sections of the record. First, as to the claimed inadvertent statement attributed to Mr. Victor Hess, the witness from Ladora, the record shows the following colloquy:

By Mr. Fowler,

Q. Does the Rock Island railroad have a station agent at Ladora?

A. Yes.

Q. Does the Rock Island agent handle matters for you in connection with your dealings with Rock Island Motor Transit?

A. Yes. (R. 455).

Witness Graham Godby of Dexter, Iowa, testified as follows on cross-examination:

Q. Who do you pay your freight bills to? Your motor freight bills?

A. You mean the Rock Island Motor?

Q. Yes.

A. You mean the person himself?

Q. Well, do they have an agent there?

A. They do at the station, yes. That is the person we pay.

Q. You pay at the station?

A. Yes.

Q. And is it the railroad station agent that you pay?

A. Yes.

Q. Regardless whether it is motor truck billed freight or rail-billed freight?

A. Yes.

Q. If you have a claim to make, do you see that same station agent to handle it?

A. Yes.

Q. Does he process that claim?

A. Yes.

Q. And he does that regardless whether it is rail freight or motor freight?

A. Yes. (R. 1188-1189).

Witness G. M. Hartline at Altoona, Iowa, testified on cross-examination as follows:

Q. The only representative the railroad or the motor company have in Altoona is the depot agent?

A. The depot agent, yes, sir.

Q. And if you have any problems in connection with that [truck service of Motor Transit], you would talk to him about it?

A. Yes. (R. 865).

Witness Louis C. Willenbroek of Mitchellville testified on cross-examination as follows:

Q. . . Now, you mentioned that you go to the depot and tell him to have the driver stop. Who do you mean by "him"?

A. The depot agent.

Q. Is that the rail depot agent?

A. That is right.

* * * *

Q. All of your dealings are direct with the station agent?

A. That is right. (R. 829).

The foregoing quotations from the record more accurately reveal just what the testimony relative to Motor

Transit's use of the railroad's depot agents was than can any summation by counsel. The record clearly shows that at many of the points involved the shippers utilizing the facilities of Motor Transit deal with the local depot agents of the parent railroad company. There can be no questioning that the presence of these representatives is of material benefit to Motor Transit and that Motor Transit thereby enjoys a distinct advantage that the independent motor carriers competing with it do not have.

Respectfully submitted,

PETER T. BEARDSLEY

FRITZ R. KAHN

1424 16th Street, N. W.

Washington, D. C.

*Attorneys for American Trucking
Associations, Inc.*

ROLAND RICE

ALBERT B. ROSENBAUM

1111 E Street, N. W.

Washington, D. C.

*Attorneys for Regular Common
Carrier Conference of A.T.A.*

EUGENE L. COHN

1 No. LaSalle Street

Chicago, Illinois

JOSEPH E. LUDDEN

2130 South Avenue

La Crosse, Wisconsin

STEPHEN ROBINSON

1020 Savings & Loan Bldg.

Des Moines, Iowa

HOMER E. BRADSHAW

REX H. FOWLER

510 Central National Bldg.

Des Moines, Iowa

Attorneys for Appellant Motor Carriers

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the sixteenth day of October 1957, I served copies of the foregoing document on the several parties herein as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Oliver Gasch, United States Attorney for the District of Columbia, at Room 3600-A, United States Court House, Washington, D. C., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.
2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with postage prepaid, to Robert Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.
3. On the Rock Island Motor Transit Company, intervening defendant, by mailing a copy in a duly addressed envelope with airmail postage prepaid, to A. B. Howland, Esq., its attorney, at 500 Bankers Trust Building, Des Moines 9, Iowa.
4. On the Employees' Committee of Rock Island Motor Transit Co., Davenport Chamber of Commerce, et al., and Shippers' Committee, intervening defendants, by mailing a copy in a duly addressed envelope with airmail postage prepaid, to D. C. Nolan, Esq., their attorney, at Suite 405, Iowa State Bank Bldg., Iowa City, Iowa.
5. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen, intervening plaintiffs, by mailing copies, in a duly addressed envelope, with post-

age prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

6. On the National Industrial Traffic League, *amicus curiae*, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to John S. Burchmore, Esq., its attorney, at 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY